

IN THE SUPREME COURT OF MISSISSIPPI  
NO. 2013-KA-01194

FRED HARRELL

PETITIONER

V.

STATE OF MISSISSIPPI

RESPONDENT

**PETITION FOR WRIT OF CERTIORARI**

COMES NOW Fred Harrell, petitioner, by and through counsel pursuant to MRAP Rule 17 and respectfully requests that the court issue a Writ of Certiorari for review of the final decision by the Mississippi Court of Appeals (COA) in this case, and in support thereof would most respectfully show:

1. The COA issued a final decision on December 2, 2014, affirming petitioner's conviction for aggravated assault. [Appendix I].
2. Harrell filed a Petition For Rehearing on December 5, 2014, which was denied by order of the Court of Appeals entered April 7, 2015. [Appendix II].
3. Harrell seeks certiorari review under issue 1.

*Facts*

4. Fred Harrell and Leonard Davis did not get along. When Davis was told that Harrell insulted Davis' girlfriend, Davis had a conversation with Harrell's boss, which was overheard by Harrell, in which Davis made what Harrell considered threats against him. A short while later, Harrell was said to have taken a pot-shot at Davis with a .22

rifle which did no harm.

**ISSUE NO. 1:       WHETHER THE COURT ERRED BY EXCLUDING  
TESTIMONY FROM HARRELL ABOUT THE SPECIFICS  
OF DAVIS' THREAT TO HARRELL?**

5. Under Issue Number 1, Harrell respectfully requests certiorari review pursuant to MRAP 17(a)(1) and (2) on the suggestion that the COA erred by rendering a decision which conflicts with published Supreme Court decisions and also erred by not considering controlling constitutional provisions under the Sixth Amendment to the Constitution of the United States of America and Art. 3 §26 of the Mississippi Constitution of 1890.

6. The state objected to Harrell testifying about the specifics of the threat Harrell overheard when Davis was speaking with Harrell's boss. [T. 226-27, 230-32]. The basis of the state's objection was hearsay which the trial court sustained on the same grounds. *Id.*

7. The COA ruled that the trial court erroneously excluded testimony from Harrell that Davis threatened him just prior to the incident but the error was harmless. (Op. ¶ 11).

8. The majority COA opinion concludes that, since Harrell did get to say generally that Davis "threatened" him, any error was cured or rendered harmless. *Id.*

9. It is respectfully suggested that the fact that Harrell was able to only mention that he had been "threatened" by Davis neither cured the error nor rendered it harmless,

because, the jury never knew the nature of the threat. Without the missing information, the jury was not able to compare Harrell's alleged reaction to the threat to gauge its reasonableness. The jury was never informed of the specific content, quality nor immediacy of the threat from Davis and deliberated Harrell's fate without this crucial evidence of his defense which prejudicially denied Harrell due process of law.

10. The jury had to deliberate whether Harrell acted in reasonable self-defense without the information about the specifics of Harrell's perception of the Davis' threat.

11. It is also suggested that the majority COA opinion also misinterpreted the testimony to conclude that the threat to which Harrell referred was nothing more than cursing. *Id.*

12. A plain reading of the record shows that the cursing came after Harrell heard Davis' threats. (Op. ¶ 10). [T. 226-32].

13. Davis' threat clearly was not hearsay. Miss. R. Evid. 801(c); *Harley v. State*, 345 So. 2d 1048, 1049-50 (Miss. 1977).

14. In *Harley*, the Supreme Court reversed a murder conviction under similar facts and the *Harley* court's rationale proves that the error here in Harrell's case was not harmless as judged by the COA. 345 So. 2d 1049-50.

15. In *Harley*, there was evidence of threats from Harley's victim, but evidence of threats communicated to or through a third party were excluded as hearsay. The state in *Harley* objected on the grounds of hearsay and the trial court sustained.

16. The *Harley* court held that, “the trial court erred in refusing to permit the appellant to present to the jury certain threats made by the deceased against the life of the appellant which were communicated to the appellant by third parties.” *Id.*

17. Relevant to the court here and which strongly supports certiorari review, the *Harley* court held that in such a case as Harley’s or Harrell’s, the principal issue is the “appellant’s state of mind upon confrontation by [the victim] and the reasonableness and apparent necessity of appellant’s actions.” *Id.*

18. The *Harley* court described the trial court’s decision this way: “it was fatal error to exclude this testimony because it was offered not for the truthfulness of the threats but merely to show the apprehensive state of mind of the defendant at the time of the fatal encounter.” *Id.* at 1050.

19. An “accused is entitled to testify as to his apprehensions and that for that purpose his testimony, as to threats of the decedent communicated to him by third persons, does not constitute hearsay. It matters not whether the communications were truthful or untruthful but only that the third person made the communication to the accused and that he had a right to rely upon the communications to make him apprehensive of the decedent's subsequent conduct ” *Id.* [Citations omitted.].

20. In *Pauley v. State*, 113 So. 3d 557, 560 ( ¶¶ 3-4) (Miss. 2013), a defense witness was asked on direct whether she knew that the defendant had said that the alleged victim had stolen some of his tools. The state objected on the basis of hearsay and the trial

court sustained the objection. *Id.* On appeal, Pauley argued that trial court erred because his statement was not hearsay since it was not offered for its truth of the matter asserted. *Id.*

21. The *Pauley* court recognized that the questioned testimony did not meet the definition of hearsay. *Id.* Pauley's statement that the victim had stolen his tools was not offered to prove that he had, in fact, stolen Pauley's tools, but to establish "that Pauley had harbored the belief" that the victim had stolen his tools. *Id.* So, the Supreme Court found that the trial court erred by excluding the testimony. *Id.* See also, *Batiste v. State*, 121 So. 3d 808, 851-52 (¶¶ 98-100) (Miss. 2013).

22. It follows, therefore, that the trial court's error here in Harrell's case was not harmless. The testimony was offered to show Harrell's state of mind and whether there was a basis for his harboring a belief that Davis was intent on harming him.

23. The exclusion of the evidence was prejudicial to Harrell, because his defense was, in part, one of self-defense. Harrell's defense depended on evidence that he had a reason to retrieve the .22 caliber rifle. Since the jury deliberated without this evidence, Harrell was denied the due process right to present evidence in support of his defenses.

24. Due process of law requires that a criminal defendant have the opportunity to present evidence in his defense. *Harley, supra*, 345 So. 2d 1050; *Terry v. State*, 718 So. 2d 1115 (Miss. 1998).

25. Exclusion of relevant evidence in support of a defense is clearly reversible

error. *Heflin v. State* 643 So. 2d 512, 516-17 (Miss. 1994); *Amacker v. State*, 676 So. 2d 909, 912 (Miss. 1996); Amend. VI, U. S. Const.; Art. 3 §26 Miss. Const. (1890).

26. The COA majority opinion here also noted that there was no proffer of what Harrell would have testified to if he had been allowed to repeat Davis' threat. (Op. ¶¶ 14-15). It is suggested, consistent with the dissenting opinion by COA Judge Barnes, that the nature of Davis' threat was obvious from the context of the testimony making a proffer unnecessary. Miss. R. Evid. 103(a)(2); *Murphy v. State*, 453 So. 2d 1290, 1293-94 (Miss. 1984). Moreover, to establish prejudice in this context of excluded defense evidence the threshold is very low, because, the right to put on a defense is absolute. *Darby v. State*, 538 So. 2d 1168, 1173-74 (Miss. 1989). So, any kind of threat would have made it over the hurdle and been admissible making the need to proffer the testimony unnecessary.

27. Here there was an evidentiary error which irreparably prejudiced Harrell, certiorari review is needed, and a new trial is warranted and respectfully requested.

WHEREFORE, PREMISES CONSIDERED, Fred Harrell prays that the Supreme Court will issue a Writ of Certiorari, review the decision of Court Of Appeals, and reverse his conviction and remand the case for a new trial.

Respectfully submitted,

FRED HARRELL, Petitioner

By: /s/ George T. Holmes  
George T. Holmes, His Attorney

**CERTIFICATE**

I, George T. Holmes, do hereby certify that I have this the 8th day of April 2015, electronically filed the foregoing Petition For Writ of Certiorari with the Clerk of the Court using the MEC system which issued electronic notification of such filing to Hon. John R. Henry, Jr., and Hon. Jeffrey A. Klingfuss, Assistant Mississippi Attorneys General.

/s/ George T. Holmes \_\_\_\_\_  
George T. Holmes

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